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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 448

AMERICAN FEDERATION OF LABOR, METAL TRADES DEPARTMENT, A. F. OF L.; FLORIDA STATE FEDERATION OF LABOR, ET AL.,

Appellants,

vs.

J. TOM WATSON, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT AS TO JURISDICTION

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
EDWARD J. BROWN,
EDWIN C. COFFEE,
J. DRESS PANNELL,
PAT WHITAKER,
TOM WHITAKER,
Counsel for Appellants.

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Appellants,

vs.

J. TOM WATSON, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

STATEMENT IN SUPPORT OF JURISDICTION

Appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled case on appeal, respectfully show:

A

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925, c. 299, Section 1 (43 Stat. 938) (United States Code Ann., Title 28, Sections 345 and 380). The final decree of the Three-Judge District Court was entered June 11,

1945. Application for appeal is herewith presented on the 11th day of August, 1945.

B

The Law of the State the Validity of Which Is Involved

The law of the State of Florida, involved in this appeal and the validity of which has been upheld by the Three-Judge District Court as not being violative of any law of the United States, is an amendment to Section 12 of the Declaration of Rights of the Constitution of the State of Florida, submitted to the people of the State of Florida for ratification by House Joint Resolution No. 13 of the 1943 regular session of the Legislature of the State of Florida, and ratified by the people of the State of Florida on the 7th day of November, 1944. That portion of the amendment here involved reads as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization; * * *"

C

Nature of Case and Rulings Below

On November 7, 1944, the State of Florida duly adopted the foregoing amendment to its Constitution, the admitted purpose of which amendment is to outlaw existing and future agreements relating to union security, that is, union-shop (commonly termed "closed shop") agreements, maintenance-of-membership agreements, or any other agreement which requires membership in a labor organization as a condition of employment.

Following public and private threats of civil and criminal

prosecutions against labor organizations and employers entering into or continuing to observe non-union security agreements, and following the institution of *quo warranto* proceedings by the Attorney General seeking to revoke the corporate charters of some of the Florida employers who continued to observe the provisions of existing union-security agreements, the appellants herein commenced a proceeding in the District Court of the United States for the Southern District of Florida, Tampa Division, under Section 380 of Title 28, U. S. C. A. (Judicial Code, Section 266 as amended), to enjoin the Attorney General and enforcing the law in question on the grounds of its alleged unconstitutionality.

The appellants are the American Federation of Labor, The Florida State Federation of Labor and various national and local labor organizations operating in the State of Florida who are parties to or are desirous of entering into union security agreements. Other appellants are individual employee members of such organizations and three Florida employers who are parties to such agreements. The respondents and defendants below are the Attorney General and other officials of the State of Florida charged with enforcement of the law in question.

The Complaint, filed in Tampa, Florida, on February 9, 1945, alleged the existence of various union security agreements voluntarily arrived at in the course of collective bargaining, to which agreements various of the appellants were parties. The Complaint asserted the indispensability of such union security agreements to the union appellants as a means of achieving job security, equality of bargaining power, protection of working standards and otherwise of furthering the trade union movement, and to the employers appellants as a means of stabilizing and improving labor relations. The Complaint set forth the acts of the defend-

ants in threatening to terminate said agreements, in preventing the making of such agreements, and the actual bringing of proceedings to terminate such agreements, and also threats of employers who are parties to union security agreements immediately to cancel such agreements because of the threats of the Attorney General and his agents, all of which was alleged to bring about imminent disruption to plaintiffs' organization, disturbance to production, and loss of benefits and protections. It was alleged that the law in question was (1) an impairment of and obstruction to the right of working people to assemble into and function through labor organizations, protected under the first amendment as a civil right, (2) an arbitrary, unreasonable and discriminatory exercise by the State of its police power, unlawfully depriving appellants of existing and future contract rights protected under Article I, Section 10 of the United States Constitution and the Fourteenth Amendment thereto, and (3) in conflict with the laws and policies of the United States as expressed in the National Labor Relations Act and the Norris-LaGuardia Act, and thus in violation of Article VI of the United States Constitution. The complaint prayed for a temporary and permanent injunction.

The District Court granted a temporary restraining order and caused a Three-Judge Court, consisting of Circuit Judge Waller and District Judges Barker and DeVane, to be assembled. The defendants and the Attorney General entered a motion to dismiss. Briefs were submitted, and the case was argued before the Three-Judge Court on the 24th day of May, 1945, the Court considering the case upon the pleadings under the defendants' motion to dismiss. On June 11, 1945, the Court entered an order dissolving the temporary restraining order and dismissing the complaint,

and in connection therewith, made the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. No facts are put in issue by any answer filed in this cause.

2. All allegations of fact, as distinguished from conclusions of law, contained in the complaint are admitted by the motion of the Attorney General to dismiss, and no factual issues necessary to a decision in this cause are involved.

CONCLUSIONS OF LAW

1. The District Court of the United States has jurisdiction of the controversy under Section 41 (1) of Title 28, U. S. C. A.

2. The District Court of the United States has jurisdiction of the controversy under Section 41 (14) of Title 28 and 43 of Title 8, U. S. C. A.

3. A Three-Judge Court has jurisdiction under Section 380 of Title 28, U. S. C. A.

4. The amendment to Article 12 of the Declaration of Rights of the State of Florida is not in violation of any provision of the Federal Constitution.

5. Said amendment to said Constitution is an appropriate exercise of the police power of the State of Florida.

6. It does not appear on the face of the amendment or on the face of the Complaint that said amendment collides with any statute of the United States, regulating labor in Interstate Commerce, but without deciding that no situations could arise which would result in conflict between Federal statutes and the said constitutional amendment, we

find that such situations are not exhibited herein and that no case is made out for the granting of and injunction against the defendants or either of them, even if it be conceded that a Three-Judge Court has the authority to enjoin cooperate or individual defendants who are not officers of the State nor charged with the enforcement or execution of the constitutional amendment in question.

7. Whether or not the allegations of the Complaint appropriately allege irreparable injury is not necessary to a decision.

The conclusions of the Court are more fully set forth in the opinion attached hereto."

Appellants appeal only from Conclusions of Law numbered 4, 5 and 6.

A copy of the opinion of the Court is attached hereto as Exhibit "A".

D

Substantiality of Questions Involved

Appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. This Court has many times stated that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the appellants are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The law in question operates completely to outlaw, not merely to condition, the making of union-security agreements, and strikes directly at the closed or union shop, forbidding its use in the State under any and all circumstances. In his dissent in *Wallace Corporation* v. *National Labor Relations Board*, 68 S. Ct. 238, Justice Jackson quite

aptly stated that "A closed shop is the ultimate goal of most union endeavor." The State of Florida, without a public need therefor, and with no ascertainable public benefit, has arbitrarily decreed that this goal shall no longer be obtainable. One hundred and fifty years of trade union history and experience have clearly demonstrated that, as is alleged in the complaint, closed-shop agreements constitute the only effective means for working people to obtain and insure (1) job security and protection from employer discrimination, (2) equality of bargaining power with consequent betterment to working conditions and (3) protection of working standards by preventing cutthroat wage competition of non-union employees. Further, the closed shop constitutes the sole means of achieving equality of sacrifice among employees by insuring that all who enjoy union wages and working conditions, obtained after years of struggle and deprivation, share in the cost of such benefits as members of the union rather than as "free riders," and share in the responsibility for obligations under collective bargaining agreements. Not a few employers have found that such agreements result in stability of employment relationships, promotion of harmony and cooperation between employers and employees, and the elimination of jurisdictional strife and discord both in the plant and between rival labor organizations, and are an effective means of increasing production by eliminating suspicion and hostility, and freeing union energies and resources for constructive cooperation rather than defensive sparring. Existing contracts insuring such benefits have been abrogated by fiat of the State, and labor organizations are denied the right to bargain for such agreements in the future. Whether the State can constitutionally outlaw such existing and future agreements is a matter of gravest importance to the fourteen million members of organized labor in this country, as well as to an increasingly large number

of employers throughout the nation. As seen from a recent bulletin issued by the Department of Labor (Bulletin No. 829 of the Bureau of Labor Statistics), almost 75% of the employees in all major industries are now working under some union-security agreement. In Florida alone, as alleged in the complaint, over one hundred thousand employees are working under such agreements. A decision by this Court is vitally necessary to remove the confusion and disruption occasioned by the law in question. It is respectfully submitted that the issue is one fully warranting consideration by the Supreme Court of the United States.

It is appellants' principal contention that the prescriptions under the Florida law of the right voluntarily to enter into such agreements, and the disruption to the orderly, peaceful and traditional functioning of voluntary associations of working people accomplished under the amendment, are entirely unjustified, serve no public purpose and are disproportionately burdensome--that reasonable men, viewing the prohibition in the light of existing circumstances, and with a knowledge of the purpose and function of the union-shop principle in modern industrial society, must and would agree that the law is arbitrary in the extreme and without rational basis. As such, the legislation exceeds the permissible range of State police power as prescribed in such cases as *Nebbia* v. *New York*, 291 U. S. 502; *Home Building and Loan Co.* v. *Blaisdell*, 290 U. S. 398, and *West Coast Hotel* v. *Parrish*, 300 U. S. 379.

The decisions of the United States Supreme Court upholding abrogation by the State of the obligations of existing contracts or state limitation or denial of the right of contract have all rested upon the existence of economic circumstances or conditions serving to justify the restrictions.

It cannot be too strongly emphasized that what is involved in this case is not regulation but prohibition; the State has elected completely to outlaw a traditional and very vital subject matter of collective bargaining. The State asserts that the mere existence of union-security agreements is in some way harmful to the public health, morals, safety or well-being. The State has not attempted to, nor can it, point to conditions which would justify such an assertion; on the contrary, the Complaint alleges a lack of abusive practices or conditions arising out of the use of union-security agreements in the State. Any assertion that union-security agreements in and of themselves are a public menace obviously must rest upon "fanciful conjecture" (*Borden's Farm Products* v. *Baldwin*, 283 U. S. 194) and is "unsupported by anything of substance" (*Liggett* v. *Baldridge*, 278 U. S. 105, 113). Abuses, of course, are possible under union-security agreements as they are possible under any of our institutions. The remedy, however, is to deal with the abuse, not to abolish the institution; killing the patient to cure the cold, as has been done in the present case, has never been considered a reasonable method of approach. Where it is possible to secure the objects sought without impairing essential rights or principles, or without imposing hardship in disproportion to possible benefits, this Court has required the State thus to exercise its police powers. See *House* v. *Mayes*, 219 U. S. 270; cf. *Tolliver* v. *Blizzard*, 143 Ky. 773, 137 S. W. 509. If, as appears from the language of the amendment and as is asserted by the Attorney General, it is safeguarding of the right to work that is the object of the legislation, surely that object can be accomplished by establishing protections in admissions to and expulsions from labor organizations holding union security agreements.

It is important to note, however, that the law, in so far as it affects union security agreements, is not concerned

with nor does it touch upon the right to work taken in the abstract or in an unqualified sense; it deals with the right to work as a non-unionist as distinguished from the right to work as a unionist. The right to work as such, i. e., access to a job under reasonable conditions, is not denied by a union shop agreement if, as is alleged in respect to the union appellants and all other labor organizations in this State, membership is open to all qualified applicants. (Cf. *Integration of Bar Case*, 244 Wis. 8, 11 N. W. (2d) 604.) The amendment seeks to protect and in result protects only the right of an individual to work without joining with his fellow workers for purposes of mutual aid or protection and for purposes of sharing in the sacrifices necessary to bring about the undenied benefits of organization. Surely, the right to work as a non-union member is no higher than the right to work as a unionist in the company of fellow union workers. Yet the State has undertaken to throw its weight and lend its support to the one right only, making it an absolute one. This is discriminatory in itself (see *Lawson* v. *Steele*, 152 U. S. 133) and further evidences the arbitrary nature of the law.

It is respectfully submitted that the questions raised under the Fourteenth Amendment and under Article I, Section 10, of the Federal Constitution are, in themselves, of sufficient substance to warrant this Court to assume jurisdiction. In addition, as is seen from the Complaint, appellants have raised questions of importance respecting possible violations of the First Amendment by reason of the impairment to effective exercise of the rights of assemblage and speech accomplished under the amendment (cf. *Thomas* v. *Collins*, Sup. Ct., No. 14, October Term, 1944) and possible violation of Article VI, Section 2, of the Constitution by reason of the conflict of the amendment with Federal law and policy relating to collective bargaining (cf. *Hill* v. *State*, Sup. Ct., No. 811, October Term, 1944). The prescription of a traditional and frequent subject of

collective bargaining may well be violative of the bargaining guarantees contained in the National Labor Relations Act (see *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 Fed. (2d) 874, certiorari denied, 313 U. S. 595), and the restraint upon and a handicap to the achievement of an equality of bargaining power between employees and their employer imposed by the amendment will in no small measure frustrate that fundamental objective of both the National Labor Relations Act and the Norris-LaGuardia Act.

The cases which sustain the jurisdiction of the Supreme Court of the United States over this appeal have been set forth in the foregoing discussion. In addition, see *Phillips* v. *United States*, 312 U. S. 246; *Parker* v. *Brown*, 317 U. S. 341; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, and *Treigle* v. *Acme Homestead Association*, 297 U. S. 189.

Respectfully submitted,

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EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION.

No. 881-Civil

Filed Jun. 11, 1945, Tampa, Fla. Edwin R. Williams, Clerk

AMERICAN FEDERATION OF LABOR, FLORIDA STATE FEDERATION OF LABOR, et al., *Plaintiffs and Representatives of a Class,*

vs.

J. TOM WATSON, as Attorney General of the State of Florida, et al., *Defendants and Representatives of a Class,*

and

TAMPA SHIPBUILDING COMPANY, INC., et al., *Nominal Defendants*

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. No facts are put in issue by any answer filed in this cause.

2. All allegations of fact, as distinguished from conclusions of law, contained in the complaint are admitted by the motion of the Attorney General to dismiss, and no factual issues necessary to a decision in this cause are involved.

CONCLUSIONS OF LAW

1. The District Court of the United States has jurisdiction of the controversy under Section 41(1) of Title 28, U. S. C. A.

2. The District Court of the United States has jurisdiction of the controversy under Sections 41(14) of Title 28 and 43 of Title 8, U. S. C. A.

3. A three-judge Court has jurisdiction under Section 380 of Title 28, U. S. C. A.

4. The amendment to Article 12 of the Declaration of Rights of the State of Florida is not in violation of any provision of the Federal Constitution.

5. Said amendment to said constitution is an appropriate exercise of the police power of the State of Florida.

6. It does not appear on the face of the amendment or on the face of the complaint that said amendment collides with any statute of the United States regulating labor in interstate commerce, but without deciding that no situations could arise which would result in conflict between Federal statutes and the said constitutional amendment, we find that such situations are not exhibited herein and that no case is made out for the granting of an injunction against the defendants, or either of them, even if it be conceded that a three-judge Court has the authority to enjoin corporate or individual defendants who are not officers of the State nor charged with the enforcement or execution of the constitutional amendment in question.

7. Whether or not the allegations of the complaint appropriately allege irreparable injury is not necessary to a decision.

The conclusions of the Court are more fully set forth in the opinion attached hereto.

CURTIS L. WALLER,
U. S. Circuit Judge;
WILLIAM J. BARKER,
U. S. District Judge;
DOZIER A. DEVANE,
U. S. District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION.

No. 881-Civil

AMERICAN FEDERATION OF LABOR, FLORIDA STATE FEDERATION OF LABOR, *et al., Plaintiffs and Representatives of a Class,*

vs.

J. TOM WATSON, as Attorney General of the State of Florida, et al., *Defendants and Representatives of a Class,*

and

TAMPA SHIPBUILDING COMPANY, INC., et al., *Nominal Defendants*

Before Waller, Circuit Judge, and Barker and DeVane, District Judges.

WALLER, *Circuit Judge:*

The 1943 session of the Legislature submitted to the people of Florida the following amendment as an addition to Section 12 of the Declaration of Rights of their Constitution:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

The people, at the General Election of 1944, adopted the proposed amendment.

The American Federation of Labor, other State and national labor unions affiliated therewith, certain individuals suing as such and in their capacities as presidents of certain local unions, and certain corporate and individual employers of labor in Florida, all as plaintiffs and repre-

sentatives of a class, brought suit in the United States District Court for the Southern District of Florida, Tampa Division, against the Attorney General and the Governor, as well as the State Attorney, County Solicitor, and Sheriff of Hillsborough County, as defendants and representatives of a class, and also against certain corporations named as nominal defendants, asserting that said amendment was in conflict with several provisions of the Federal Constitution and statutes and praying temporary and permanent injunctions against the defendants in said suit.

The District Judge granted the temporary restraining order and caused this three-judge court to be assembled.

Jurisdiction of the Federal Court was predicated upon the allegations that the suit arises under Section 10 of Article I, Article VI, and the First and Fourteenth Amendments to the Constitution of the United States as authorized by Section 41(1) of Title 28, U. S. C. A., and that it is also a suit for redress for the deprivation of civil rights as permitted by Section 41(14) of Title 28, and Section 43 of Title 8, U. S. C. A. Jurisdiction of the three-judge Court is asserted under Section 380, Title 28, U. S. C. A.

The motion of the Attorney General of Florida to dismiss presents the legal issues upon which the case has been heard and which form the basis of the controversy, to wit:

I. Whether the allegations of the complaint are sufficient to vest jurisdiction in the District Court of the United States:

(a) as a controversy arising under the Constitution and the laws of the United States involving an amount in excess of $3,000.00 under Section 41(1) of Title 28, U. S. C. A.; or

(b) as a suit for the redress of the deprivation of civil rights under Section 41(14) of Title 28, U. S. C. A., or Section 43 of Title 8, U. S. C. A., under which sections the amount in controversy is not material to a suit; and

(c) Even if the District Court of the United States has jurisdiction under either of the aforementioned sections, whether a case for the convening and con-

sideration of a three-judge Court under Section 380, Title 28, U. S. C. A., has been shown.

II. Whether the amended section of the Constitution of the State of Florida deprives the plaintiffs of any rights under the following provisions of the Constitution and laws of the United States:

(a) Section 10 of Article I of the Federal Constitution, prohibiting any state from passing any law impairing the obligation of contracts;

(b) Article VI of the Federal Constitution, providing that the Constitution, and laws of the United States which are made in pursuance of the Constitution, shall be the supreme law of the land;

(c) The First Amendment of the Constitution of the United States, prohibiting Congress from making any law abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the Government for redress of grievances;

(d) The Fourteenth Amendment, which prohibits any state from making or enforcing any law abridging the privileges or immunities of citizens of the United States or from depriving any person of life, liberty, or property without due process of law or from denying to any person the equal protection of the law;

(e) Sections 161 to 166 of Title 29, U. S. C. A., commonly known as the National Labor Relations Act.

III. Whether or not the allegations of fact in the complaint, as distinguished from conclusions of law, show irreparable injury on the part of the plaintiffs, or either of them.

IV. Whether or not the plaintiffs, or any of them, are entitled to maintain a suit for the deprivation of civil rights under the Constitution and laws of the United States.

V. Whether or not the constitutional amendment is a valid and lawful exercise of the police power reserved to the State under the Constitution.

VI. Whether or not there is any conflict between the provisions of the National Labor Relations Act and said constitutional amendment.

There are certain minor, and more or less collateral, questions as to the propriety or legality of joining certain parties as plaintiffs and making certain other defendants,[1] nominal or otherwise, but in contrast to the importance of the issues presented here it seems unnecessary to give them particular attention. We prefer to come as promptly as possible to the real issues in the case, with the idea of expediting the progress of this case to the Supreme Court, knowing full well that what we here say will not be long remembered.

We are of the opinion that under the allegations of the complaint the United States District Court for the Southern District of Florida, as distinguished from a three-judge Federal District Court, has jurisdiction under the allegation that the suit arises under the Constitution and laws of the United States and where the amount in controversy is required to exceed $3,000.00, exclusive of interest and costs,[2] and that such Court also has jurisdiction of the controversy as a suit to redress alleged deprivation of civil rights under Sections 43 of Title 8 and 41(14) of Title 28, U. S. C. A.

The question of whether or not a three-judge Court has jurisdiction is more difficult. The controlling statute is Section 380 of Title 28, U. S. C. A., which prohibits a single District Judge from entering "an interlocutory injunction sustaining or restraining the enforcement, operation, or execution of any *statute* of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, * * *." (Italics added.) Noth-

[1] Rule 17b of the Federal Rules of Civil Procedure provides:

"That a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

[2] See Form 2 of the Federal Rules of Civil Procedure as to allegation of amount in controversy.

ing is said in this statute as to restraining the enforcement of a provision in the *constitution* of a state. There is, of course, a wide distinction between a constitutional amendment, adopted by the people, and a statute passed by the Legislature. A mere majority of the Legislature may enact a statute, with the Governor's approval, but it takes three-fifths of the members of both Houses of the Legislature of Florida even to propose an amendment to the Constitution, and the proposed amendment must then be published in a newspaper in every county of the state for three months before the next general election, and at which it must receive a majority of those voting thereon in order to become a part of the organic law of the state. (Article 17, Section 1, Constitution of the State of Florida.) A state statute is an inferior source of law to that of a state constitution, and cannot stand in opposition to it.

United States District Courts are courts of limited jurisdiction, and particularly is this true of a three-judge Court. It is wholly statutory and all questions as to its jurisdiction must be strictly construed. *Phillips* vs. *United States*, 312 U. S. 246.

Cognizant that a three-judge Court is without jurisdiction to grant an injunction in a case involving a municipal ordinance which is alleged to be unconstitutional[3] and that the same is true where an injunction is sought against a state statute which is not statewide in its scope,[4] we entertain grave doubt as to whether or not we, as a three-judge Court, have jurisdiction of the case here for the reason that the constitutionality of no statute of the State of Florida is involved. Were it not for certain language in the case of *Phillips* vs. *United States*, *supra*, and an appreciation of the fact that the dictum of today may, perhaps, be the law of tomorrow, we would hold that this Court is without jurisdiction. In the *Phillips* case neither the State Constitution nor statutes were under attack, but only the acts of the Governor which had been done under color of general provisions

[3] Ex Parte Collins, 277 U. S. 565.

[4] E. C. *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U. S. 208.

of the Constitution and laws of Oklahoma; however, the Supreme Court said that in order to bring the procedural device of the three-judge Court into play a suit is required "which seeks to interpose the Constitution against the enforcement of a state policy, whether such policy is defined in a State Constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission'," although the statute mentions neither state constitutions nor state policies, nevertheless the Court held that the law in reference to the jurisdiction of the three-judge Court could not be liberally construed but could only be construed "as an enactment technical in the strict sense of the term and to be applied as such." The decision inveighed against stretching the three-judge Court statute, meanwhile apparently stretching it to include state constitutions and state policies. As we interpret the language in the *Phillips* case the scope of the three-judge Court statute has been enlarged from an injunction restraining the enforcement of "any statute of a state" to the "enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute," so in conformity to the inharmonious language in the *Phillips* case, quoted above, we hold that a three-judge Court has jurisdiction. We doubt not that the statute ought to have prohibited a single judge from enjoining action under a state constitution, for it seems incongruous that a single judge should be able to enjoin action under a constitutional provision but that he could not do so under a state statute.

The motion to dismiss, admitting all of the facts appropriately alleged in the complaint, but not legal conclusions, presents three important legal questions:

1. Is the Florida constitutional amendment in violation of any provisions of the Federal Constitution?

2. Is the constitutional amendment a valid exercise of the police power of the State of Florida?

3. Is the constitutional amendment in conflict with the provisions of any Federal statutes which were enacted within the power delegated to Congress?

No substantial question of fact is involved requiring the taking of testimony or the making of express findings of facts.

The authority of the United States is supreme on all subjects which the Constitution has committed to it, and a state constitution, like a state statute, must fall if it is contrary to any provisions of the Federal organic law,[5] or if it is in conflict with any provisions of the Federal statutes that were enacted within the scope of the power conferred upon Congress by the Constitution.[6]

The wording of the Florida Constitutional amendment is difficult, but it definitely does not violate the First Amendment by abridging freedom of speech or of the press or of the right of assembly, or the right of petition to the Government for redress. The assaulted amendment undertakes to preserve to employees, in full vigor, the right of collective bargaining. Instead of preventing or abridging the rights of speech, press, assembly, and petition, the amendment seeks to preserve it to those who do not join a labor union as well as to those who do. This amendment has no similarity to anti-picketing statutes or statutes which require the payment of a license by a labor organizer. The amendment is not in violation of the First Amendment to the Federal Constitution. The same is true of the allegations as to its violation of the Fourteenth Amendment. There is no prohibition against a citizen belonging to any union that he chooses, but the prohibition seems to be against requiring membership in the union in order for a citizen to be eligible for work. Under statutes of the United States, such as Section 102, Title 29, U. S. C. A., a citizen is declared to be free to join a union or not, and one of the pur-

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[5] "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Court. One's right to life, liberty, and property, free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Justice Jackson in *Board of Election* v. *Barnett*, 319 U. S. 624.

[6] Article VI, U. S. Constitution; *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218.

poses of that statute, as well as the National Labor Relations Act, was to accord to employees full freedom to belong, or not to belong, to a union. The Florida constitutional amendment prohibits no one from joining a union but undertakes to declare that it shall not be a condition precedent to the right to work. It does not deny the labor union member the equal protection of the law, but appears to be designed to give to the non-union worker a protection of law which he had not theretofore enjoyed.

There is no vested right to have the police power of a state remain static. Every contract, involving subject matter that affects the public interest, into which a citizen may enter, is subject to the right of a state to regulate or to prohibit whenever it is deemed by the state to be essential in the public interest, and when it violates no provision of the superior national or state law. Contracts entered into prior to state and Federal prohibition against the manufacture or sale of intoxicating liquor were not held to have been illegally impaired by the adoption of prohibition when the states, and subsequently the nation, deemed prohibition to be in the public interest.

There are general allegations in the complaint as to contracts entered into prior to the amendment and alleged to have been impaired by it, but even if these allegations meet the requirements for definiteness and specificity in order to call forth the injunctive processes of the Court, the question first to be answered would be whether or not the state was without authority in the exercise of its police power to adopt the amendment in question.

There are certain principles relating to the police power of the states so axiomatic as not to need a statement as to their source, that might well be restated here.[7]

1. The United States is a government of limited, enumerated, and delegated powers, having only such authority as has been granted to it by the Constitution or necessarily implied therefrom.

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[7] See discussions in 11 Amer. Jur., Const. Law, Police Power, Sec. 245, *et seq.*

2. In construing a law of the United States we look to see if power has been granted, but in construing a law of the state we look to see if it has been prohibited, realizing that all attributes of the government that have not been surrendered by the adoption of the Federal Constitution and its amendments have been retained by the state.

3. It is fundamental that state laws must yield to the superior force of Federal laws which were passed within the sphere of delegated powers. However, a state law is superseded by a congressional law only to such an extent as the two are inconsistent.

4. An act passed under the police power of a state cannot be cast aside as inconsistent with an act of Congress unless there is an actual repugnancy or a complete taking over of the legislative field by Congress, and the rule has been laid down that a state statute is in conflict with a Federal statute when one may incur the penalty of the Federal statute by obeying the state statute, or vice versa.

5. The police power of a state is very broad and comprehensive and is liberally understood and applied. This principle is so well recognized and the police power is of such elasticity that the principle of *stare decisis* has no application to an exercise of this power. This position is justified, for if it were not thus mistaken decisions might destroy the power of society to protect itself. The state cannot contract away its police power[8] and the Courts cannot decide away that which the state itself cannot contract away.

6. The courts cannot create a new Constitution. Laws and court-made rules of expediency must not be placed above the Constitution.

7. Labor and labor unions are affected with a public interest and are subject to the regulatory power of the states for any reasonable regulation which will not be inconsistent with the Constitution of the United States and statutes enacted within the scope delegated by the Constitution to the Congress.

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[8] *Stone* v. *Mississippi*, 101 U. S. 814.

8. Collective bargaining, self-organization, and other kindred union activities necessarily involve the rights of free speech, freedom of the press, freedom of assembly, and freedom of petition, which may not be denied by state statute or constitution, but we also must recognize that the total of union activity is directed toward economic objectives which involve purely commercial activities and which may be regulated by the state upon any reasonable basis when not in conflict with superior law.

9. The very existence of the state as well as "The security of the social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property," [9] depend upon the police power of that state.

10. "The powers that are not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people." [10] The states existed before the Constitution of the United States, and they possessed the police power before the adoption of that organic document,[11] and that police power was not by the Constitution delegated to the United States, and hence under the Tenth Amendment it is reserved in the states or in the people.

11. There is, in the strict sense, no Federal police power.

12. Rule by the majority is the essence of democracy. Members of a labor union are citizens first and subject to the will of the majority, lawfully exercised, and where that will has been exercised by a direct expression of the people at the polls the result is the fullest exercise of the democratic process and the fullest expression of the source of all political power—the people. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." (Dissenting opinion of Justice Brandeis in *Duplex Company* v. *Derring*, 254, U. S. 443).

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[9] Slaughterhouse cases, 16 Wall. 36.

[10] Tenth Amendment, Federal Constitution.

[11] *N. Y.* v. *Miln*, 11 Peters (U. S.) 102.

13. The wisdom or lack of wisdom of a state statute or of a provision in a state constitution is not a matter for the courts. The people, through their representatives in the Legislature and through their vote for an amendment to their constitution, have the right to commit folly if they please, provided it is not prohibited by the Federal Constitution or antagonistic to Federal statutes authoritatively enacted concerning the matter involved. "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands" (Dissenting opinion of Justice Brandeis in *Duplex Company* v. *Deering, supra*).

14. It is the duty of the court to indulge in the presumption that the amendment is not in conflict with the organic law unless the contrary is clearly made to appear.

A consideration of these fundamental concepts impels the conclusion that the Florida constitutional amendment does not contravene any provision of the Federal Constitution and for aught that now appears it is a valid exercise of the police power of the State of Florida. Definitely labor unions are affected with a public interest as exemplified by the National Labor Relations, the Norris-LaGuardia, and Fair Labor Standards Acts, passed by Congress in and about the regulation of interstate commerce, and by numerous acts by state legislatures regulating labor unions in phases not embraced within the scope of the power of the national congress.

In view of the fact that no labor legislation by Congress has required an employee to belong to a labor union or has made the closed shop mandatory, but on the contrary the Federal public policy in regard to compulsory membership in labor unions is stated in Section 102 of Title 29, U. S. C. A., as follows:

> "* * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract to protect his freedom of labor, and thereby to obtain

> acceptable terms and conditions of employment, wherefore, though *he should be free to decline to associate with his fellows*, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, * * *" (Emphasis supplied.)

and in view of the provisions of the Florida amendment that it shall not be construed to deny or abridge the right of employees by and through a labor union to bargain collectively with an employer, there does not appear to be any provision of the Federal labor regulatory statutes with which the constitutional amendment collides. So long as the right to organize into a union and to bargain collectively is not abridged, there is no denial of freedom of speech, press, assembly, and petition. Whatever was traditionally a part of the process of collective bargaining seems to have been left unabridged by the second clause in the amendment.

The amendment makes it possible for the non-union worker to have "a free ride," that is, to have the benefit of the gains and advantages that have accrued through the planning, the effort, the expense, the struggle, and the influence of the unions, without bearing any of their burdens, but this permissive incidence of poor sportsmanship is not new in the law. A substantial portion of the population in many communities have all the benefits of government, yet pay no taxes. Occasions are not singular when free riders in government are the recipients of its greatest solicitude, and that fact that the law gives an unearned advantage to the dissident or disinterested is but slightly dissimilar to the building of a school house largely from taxes paid by corporations which have no children to educate. This ground of objection was one for the Legislature and the people rather than the courts.

It will be observed that the constitutional amendment is not self-executing and no enforcing legislation has been enacted. No prosecution under a criminal statute is involved, and although the Attorney General contends that a closed shop was illegal under Section 1 of Chapter 4144,

Laws of Florida, Acts of 1893 (Sec. 833.02, Florida Statutes, 1941), nevertheless, it is noted that the Supreme Court of Florida, in the case of *Jetton-Dekle Lumber Company* v. *Mather, et al.*, 43 So. 590, held that the Act "will not be applied to the case of union laborers who strike in order to secure all the labor for themselves," which seems to say that the statute did not prohibit a closed shop. This decision, under *Erie Railroad* v. *Tompkins*, 304 U. S. 64, is binding under the Federal Court.

A three-judge Court cannot be convened merely to prevent a multiplicity of suits in the state courts by the Attorney General against employers of labor. But it does not seem necessary for us to determine whether or not irreparable injury to plaintiffs can result, nor do we here undertake to decide what complications might arise out of the operations of the National Labor Relations Act and the Florida constitutional amendment, but deem it necessary only to say that the Federal Act and the amendment on their face do not appear to be in conflict, and it will be time enough to judge of such conflicts if and when they actually arise. This is not an action for a declaratory judgment but an injunction suit in anticipation of irreparable injury.

From the foregoing it appears that the temporary injunction granted herein should be dissolved and vacated, and the motion of the Attorney General to dismiss the complaint should be sustained.

Let an appropriate order be submitted.